AUG
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 191—OCTOBER TERM, 1962

In the Matter of the Application of JULIA IOANNOU for leave to withdraw funds deposited with the Treasurer of the City of New York for the benefit of VIKTORIA MICULKA in the Estate of

ALEXANDER MAREK,

Deceased.

JULIA IOANNOU,

Appellant,

PEOPLE OF THE STATE OF NEW YORK and JOHN T. MEEHAN, as Public Administrator of the County of Bronx,

Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

SYDNEY J. SCHWARTZ,
Attorney for Appellant,
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In the

Supreme Court of the United States

No. 491—OCTOBER TERM, 1953

In the Matter of the Application of JULIA IOANNOU for leave to withdraw funds deposited with the Treasurer of the City of New York for the benefit of VIKTORIA MIČULKA in the Estate of

ALEXANDER MAREK,

Deceased.

JULIA IOANNOU,

Appellant,

PEOPLE OF THE STATE OF NEW YORK and JOHN T. MCLEAN, as Public Administrator of the County of Bronx,

Appellees.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellee People of the State of New York* moves to dismiss or affirm on two grounds:

1. That Surrogate's Court Act, Sec. 269 is constitutional and was so held in *Matter of Braier*, 305 N. Y. 148, app. dism. sub nom. *Kalmanc v. Green*, 346 U. S. 802 (Mot. p. 5).

* Appellee the Public Administrator has taken no active part in the appeals.

2. That the decision below does not deny equal protection to appellant because New York has the power so long as political conditions remain unchanged in Czechoslovakia to deny recognition to the assignment "even against any impulse the distributee may have" without regard to her personal situation (Mot., p. 7).

Neither ground has merit.

I

Matter of Brajer, supra, did not reach the point involved in the case at bar. That case involved a decree of the Surrogate directing the deposit of the beneficiary's interest in the estate subject to further order of the Surrogate. The order was similar to the order appearing in the record in this case pursuant to which the initial deposit was made in 1956 (R. 9-10).

Matter of Brajer did not involve a hearing. Appellant there raised three questions which are not present in this case: (1) that the Trading with the Enemy Act covered the same ground as Section 269; (2) that a treaty between the United States and Hungary was contravened by Section 269; (3) that Section 269 encroached upon the federal power over foreign commerce (305 N. Y. 153).

The point involved in the case at bar, namely, the denial of due process, was not reached because the Court of Appeals stated in its opinion that appellant there might have a hearing on applying to the Surrogate for an order permitting withdrawal of the funds from the City Treasurer (305 N. Y. 159). The Court stated (*id.*): "The assurance of such a hearing fully satisfies the demands of due process." It is that hearing which was applied for in the case at bar. The hearing which was held, however, was so circumscribed in scope by the holding of *Matter of Geiger*, 7 N. Y. 2d 109, that it was in truth no hearing because the Surrogate was precluded from considering the questions

of fact pertaining to the beneficiary's personal ability to make a voluntary gift (R. 34).*

The issue which we raise at pages 14-16 of the Jurisdictional Statement is thus not answered by the decision of *Matter of Graser, supra*, nor is the argument responded to by appellee in the motion to dismiss or affirm. *Matter of Geiger, supra*, does not answer the constitutional question. It creates it by placing a construction on the statute which deprives the distributee of important rights of ownership, and refuses to permit the Surrogate to inquire into, and give effect to, the facts.

II

The construction of the statute which has been evolved in New York does violence to its actual words. The statute itself is directed to the beneficiary's personal circumstances for the ostensible benefit of the individual beneficiary (Jur. Stat., pp. 3-4). The construction of the statute in *Matter of Geiger, supra*, which was followed in the case at bar, is that the individual circumstances of the beneficiary will not be inquired into so long as political conditions in the country where the beneficiary resides have not changed (7 N. Y. 2d at p. 112). It is this construction which deprives appellant and her assignor of equal protection in the case at bar.

The specific example of *Matter of Rayski*, 28 Misc. 2d 253, 218 N.Y.S. 2d 111, cited at pages 18 and 19 of our Jurisdictional Statement points up the disparity in treatment. There a Polish resident who made a trip to the United States on a travel visa, was allowed to withdraw the funds and then go back to Poland.

The statute as written does not inhibit a gift by the distributee made freely and without duress. The construe-

* See colloquy between the Surrogate and appellant's counsel quoted in Jurisdictional Statement, pages 11-12.

tion of the statute by the Court of Appeals in *Matter of Geiger* and in the case at bar distorts its purpose to the point where it permits an assignment by some foreign beneficiaries but not by others; and the test applied has nothing to do with the factual circumstances of the particular beneficiary but merely with the political climate of the country of domicile.

Our discussion of this problem at pages 16-20 of our jurisdictional statement is not answered by appellee. The cases cited at page 7 of the motion to dismiss are all irrelevant and clearly inapplicable.

Matter of Weidberg, 172 Misc. 524, 15 N.Y.S. 2d 252, was an application by a Nazi consul to receive Jewish property. Obviously, the application was denied without hearing.

Matter of Getream, 200 Misc. 543, 107 N.Y.S. 2d 225, was an application by an attorney in fact of an Hungarian resident where, again, there was no hearing and no proof of the purpose or the circumstances surrounding the execution of the document.

Matter of Berlinsky, 202 Misc. 351, 115 N.Y.S. 2d 549, was another case decided without hearing where the court held from the evidence in the papers that it was apparent that the beneficiary did not intend to make a gift.

Matter of Mark, 115 N.Y.S. 2d 174, was another case where there was no hearing nor any proof of the circumstances.

In *Matter of Eretsian*, 23 Misc. 2d 999, 202 N.Y.S. 2d 501, the Surrogate made inquiry by writing to the beneficiary, and determined that he had no intent to make an assignment.

Appellee in following, as it must, the rationale of *Matter of Geiger, supra*, states (Mot. p. 7): "Absent a determi-

nation that conditions (relating to government policy) have so changed in Czechoslovakia * * * her funds remain protected even against any impulse the distributee may have to 'assign' away her interest.'" This statement reveals the fallacy of appellee's position.

The statute says nothing about the political climate in Czechoslovakia. It was enacted to protect the individual right of ownership of the distributee against confiscation by a foreign government. There is nothing in the statute which states that such right of ownership, if it can be voluntarily exercised, should not be honored.

The Court of Appeals held in this case that with respect to the distributee here involved such voluntary exercise of a right of ownership may be denied although other foreign beneficiaries living in other countries may exercise precisely similar rights of ownership which will be recognized.

To liken the donation to "giving away her heritage for a mess of pottage" (Mot. p. 7) is certainly cavalier treatment of the facts in the record. The distributee, Mrs. Miculka, made a gift of her interest to appellant without any strings attached (R. 32, 33, 34, 45-6, 47). Her motivation was in grateful appreciation of a moral obligation to the assignee's mother who had conferred benefits on the assignor in earlier years (R. 34-35). The assignor is an old lady, now 82 years of age (R. 24), who when she made the assignment knew that there was no foreseeable prospect that she could ever enjoy the funds during her lifetime (R. 32). She did want the satisfaction and joy of knowing that the daughter of her close friend and cousin would reap some benefit from this fund (R. 34).

To inhibit a donation under those circumstances, voluntarily and freely made in the United States Embassy in Prague, is to deprive appellant and her assignor of the equal protection of the law.

CONCLUSION

The case presents a substantial federal question as outlined in our Jurisdictional Statement. The motion should be denied and probable jurisdiction noted.

Respectfully submitted,

SYDNEY J. SCHWARTZ,
Attorney for Appellant.